No. 85-1708

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IN THE

Supreme Court of the United States

October Term, 1985

STATE OF CALIFORNIA, et al.,
Appellants,
v.
CABAZON BAND OF MISSION INDIANS, et al.,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE TULALIP TRIBES OF WASHINGTON, THE SOBOBA BAND OF MISSION INDIANS, THE LaJOLLA BAND OF MISSION INDIANS, AND THE TRINIDAD RANCHERIA

AS AMICI CURIAE
IN SUPPORT OF THE CABAZON AND MORONGO TRIBES

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Order Granting Defendants' Motion for Summary Judgment (August 14, 1984), State v. Hatch , et al. , W.D. Wash. No. C83-1518R...

INTEREST OF AMICI CURIAE TRIBES

A. The Tulalip Tribes of Washington.

The Tulalip Tribes of Washington is a federally recognized Indian Tribe, and a successor in interest to tribes and bands that signed the Treaty of Point Elliott, 12 Stat. 927 (1855). The Tribe occupies a reservation consisting of approximately 22,000 acres in a predominantly rural area of Snohomish County, Washington. Its governing body functions under a federally approved constitution and bylaws, adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. (476. Through the Indian Reorganization Act and other federal laws and policies, the United States has supported the commitment of tribes to self-determination and economic develpment. President Reagan has reaffirmed the unique government to government relationship

between the United States and tribes, and the federal interest in strong tribal governments. At the same time, his administration has encouraged tribal governments to explore alternative ways of revenue raising and economic development as federal financial assistance to tribes is sharply decreased. President Reagan's Indian Policy statement (January 24, 1983). Faced with similar cuts in federal financial assistance, states like Washington have turned to government run lotteries. In Washington State, local governments and charitable organizations are permitted to raise substantial revenue by regularly running bingo games, and certain other gambling activities.\1

1. Such gambling activities, when run by governments have traditionally been considered a form of voluntary taxation, and a legitimate revenue raising mechanism. See, State and Local Taxation, 20 Wayne L. Rev. 611, 645 (1974); Clark v. Mayor and Alderman of the City of Washington, 25 U.S. (12 Wheat) 40, 53-54 (1827); Karafa v. New Jersey State Lottery Commission, 128 N.J. Super. 499, 324 A.2d 97, 100 (1974). Regarding the broad taxing powers of tribes

(Continued on next page)

Several years ago, with a loan from the Bureau of Indian Affairs of nearly $1 million dollars, and a loan of approximately $2 million from a private financial institution, the Tulalip Tribe established a reservation entertainment center on tribal trust land. There, the tribal government operates bingo, pull tab, and punchboard games. All profits go to the government's general operating fund and have enabled the Tribe to continue some of the badly needed social services which otherwise could no longer be provided. In addition, the Center has trained and employed a substantial number of tribal members and their families in food service, management, and other required skills, providing jobs on a reservation where

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(Footnote 1 continued)
as to tribal transactions with non-Indians from outside the reservation, see, Washington v. Confederated Tribes, 447 U.S. 134, 152-154 (1980).

unemployment has hovered around 45-50%.

Several years ago, the Washington State Gambling Commission litigated the question of whether certain Washington state law restrictions applied to the tribe. State v. Hatch, et al., W.D. Wash. No. C83-1518R. In 1984, the federal district court, in a carefully reasoned opinion, concluded:

> ...RCW 9.46.030 authorizes bingo and pulltab operations by a wide variety of charitable and nonprofit organizations... The Washington statute regulates bingo as a money making venture by limiting the location and number of days of operation, requiring that all proceeds be applied to the organization conducting the game and prohibiting the use of professional managers other than members or employees of the organization. RCW 9.46.020(2). Pulltabs are regulated by limiting the price at which they may be sold. RCW 9.46.110.
>
> * * *
>
> [P]rofits received by the Tribe from the bingo and pulltab activities are to be invested for the betterment of the Indian community...while the Tulalip Tribe may not qualify as a charitable organization within the letter of the Washington gambling statute and the Tribe's gaming

> operation does not fully comply with all requirements of the statutory scheme, the Tulalip Tribe can be said to fall within the spirit of the state's permissive intent.

Id., Order Granting Defendants' Motion for Summary Judgment (August 14, 1984) p. 10 (copy appended). The State's appeal to the Ninth Circuit was dismissed as untimely, and there has been no further litigation in Washington State over tribal bingo.\2

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2. There has been federal enforcement as to isolated instances of Indian casino gambling. In U.S. v. Lummi, the federal government distinquished tribal bingo operations:

> Washington State, as Farris holds, and as we have discussed above, has a strong prohibition policy against professional gambling. Professional gambling includes such activity as bookmaking, blackjack, craps, etc., and is virtually either totally prohibited, or limited to one narrow exception, the fund raising event, popularly known as "Reno night". Bingo, on the other hand, is permitted to be played weekly by bona fide charitable or non-profit organizations under certain conditions. The same constraints apply to both the Reno night and to bingo in regard to the nature of the organization which can conduct the

(Continued on next page)

In the Tulalip case, the State Gambling Commission asserted a fear of organized crime infiltration. However, its concerns are contrary to the views of local law enforcement familiar with the tribal operation. In commenting on the various tribal gambling bills being considered by Congress, the Snohomish County Sheriff wrote:

> July 2, 1986
>
> Senator Mark Andrews, Chairman
> Senate Select Committee on Indian Affairs
>
> Dear Senator Andrews:
>
> I write this letter concerning the Tulalip Tribes of Washington's gaming enterprise located on the Tulalip Indian Reservation in

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(Footnote 2 continued)
activity, but the nature of the activity which can be engaged in is very different.

Memorandum of the United States in Support of Plaintiff's Motion for a Preliminary Injunction, United States v. Lummi, No. C83-946 (W.D. Wash. 1983) at 33-34.

Snohomish County, Washington for the due consideration of the Senate Select Committee on Indian Affairs now considering H. R. 1920, S.902 and S.2557.

I am personally and professionally acquainted with the management and operation of the Tulalip Bingo and pull tab gaming conducted at the Tulalip Bingo Center.

The Tulalip Indian Reservation is a PL280 reservation and as Sheriff of Snohomish County I am the chief law enforcement officer responsible for investigation of crimes committed by or against Tribal members on the reservation.

The controls, checks and balances established by the all tribal mamagement has resulted in a gaming operation, in my opinion, free from outside or corrupt influences or practices. It is a well run and "clean" enterprise.

The security of the facility and the gaming public is adequately protected and includes off-duty members of my department. I might add that from the inception of planning and the final construction of the entertainment center, both sides have worked in a cooperative spirit to make sure that this operation remained free and clear of all outside influences that represent gambling interests, and both parties agree that these policies have afforded the protection and safety provided by the Sheriff and the image and integrity for the Tulalip Tribes.

I would urge that all due consideration and respect for tribal gaming in the nature of bingo, pull tabs and punch board run by Tribes themselves be afforded by the committee in its consideration of the various legislative proposals. Thank you.

Sincerely,

/s/
Robert M. Dodge
Snohomish County Sheriff

The Tulalip Indian Reservation has been plagued by extremely poor economic and living conditions, which the tribal government has been committed to alleviating. Through its general funds, the tribal government has operated a variety of social services, including mental health, medical, dental, and alcohol treatment programs, a reservation headstart pre-school facility, public school busing, higher education scholarships, garbage collection, fire protection, recreational programs for senior citizens and children, and other services. The tribal government

is also committed to increasing employment opportunities on the reservation through a coordinated program of economic development. However, economic development has been limited by the scarcity of exploitable natural resources, and lack of adequate funds. The Tribe has a small logging operation, but has had to rely primarily for tribal revenue on leasing tribal lands to non-Indians, rather than developing reservation lands itself because of its limited financial resources.

In the early 1980's, as the Tribe faced increasing and drastic cuts in federal and state support for reservation services, it needed to find other revenue sources for a number of services, such as a nurse practitioner position, a health administrator position, a health administrator position, a health planning position, orthodontic services, certain mental health services, and its alcohol treatment program. The Tribe explored a

possible tribal shopping center development, but was first stymied by the refusal of sewer and water services from the nearby City of Marysville, which feared the potential economic competition to Marysville businesses, and then by a down turn in the general economy limiting the proposed shopping center's potential. After considering a variety of economic development opportunities, the tribal government, with substantial financial assistance from the Bureau of Indian Affairs, developed a program to develop tourist and recreational opportunities on the reservation. In June 1983, the Tribe opened the Tulalip Entertainment Center. In addition, a nearby hotel/restaurant complex has been constructed on tribal trust land.

The only gambling activities permitted at the Tulalip Entertainment Center are bingo and pulltab games. The facility is

operated pursuant to a tribal ordinance, which was reviewed and approved by the Secretary of Interior, and which prohibits any private gambling operation on the Reservation. No personal profit making from the bingo and pulltab games is permitted, and all revenue goes to operation costs, debt retirement, and the tribal government's general fund. The Tribe operates the facility without any outside management company. The Tulalip Entertainment Center manager is a tribal member who received training in accounting and business under the GI Bill, served as an Assistant Tribal Business Manager for the Tribe from 1959 through 1963, and as the Tribal Business Manager, from 1963 to 1978. The Tulalip Entertainment Center has 93 employees, 69 of whom are tribal members, 12 whom are spouses of tribal members, and 6 of whom are from other tribes. The 6 other employees are non-Indians with no affiliation with the

Tribe or its members. They work in non-managerial capacities, such as bingo number callers, food servers, pulltab selling, and security.

Before opening the Tulalip Entertainment Center, the Tribe employed a former chairman of the Washington State Gambling Commission to assist in establishing a tightly controlled, well run program. The personnel, particularly the top management, were subject to tribal background checks, including the checking of FBI records, for links with organized crime or other criminal activities. All employees are carefully trained, to insure tight security. The Tribe spent substantial sums on sophisticated equipment, including 18 cameras, tv monitors, a direct centralized computer accounting of cash register transactions, and a special security room with a round-the-clock security patrol. Off-duty

Snohomish County police are employed to assist the Tribe in patrolling the facility on weekends and evenings.

The Tribe selected the operation of bingo and pulltab games because they have been extremely successful and widely used as means of raising funds for charitable purposes in Washington State. According to State records, produced in the Hatch case, in FY '82, statewide gross receipts from bingo, pulltab and punch board games were $89,747,976.00 from bingo, and $125,103,942.00 from punch board and pulltabs. In 1981, there was 57 bingo operations in Snohomish County alone, which generated gross receipts of $9,495,905.00, and 671 bingo licenses throughout the State. State bingo licensees paid prizes in excess of $68,000,000.00 in 1982 (in excess of $7,000,000.00 in Snohomish County) and had net income in excess of $8,000,000.00 ($865,612.00 in Snohomish County). Until recently, the Washington

State Gambling Commission placed no dollar limit on gross revenues to a single organization from bingo, pulltabs and food services. Single facilities, such as Big Brothers in Spokane, Washington, grossed $4,300,000.00 in 1982 from such operations. State regulations now limit each bingo operations' revenue to annual gross receipts of $3,500,000.00. In its first year of operation, Washington State's recently established lottery generated $66,700,000.00 for the State General Fund.

B. Soboba Band Of Mission Indians, LaJolla Band Of Mission Indians, And Trinidad Tribe.

The Soboba Band of Mission Indians has a bingo facility which is presently closed. The LaJolla Band of Mission Indians, and the governing body of the Trinidad Rancheria do not have any bingo or other gambling operations on their reservations.

However, all three tribes join in this amicus brief because of their concern with the sweeping and fundamental changes in Indian law principles which California and other states are advocating. Each of these California tribes suffer from exceptionally high unemployment and impoverished reservation conditions. A ruling that states may exercise regulatory authority over them, in the absence of Congressional authorization or under Pub L 280, could have a severe impact on their efforts to improve living conditions and economic opportunities on their reservations. In California, pre-Bryan efforts to assert such regulatory authority highlighted the problems of a wholesale application of state and local laws to reservation Indians. As was pointed out by the Ninth Circuit Court of Appeals in regard to the impact on tribal housing programs and tribal economic development generally,

> ...subjecting the reservation to local jurisdiction would dilute if not all together eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potential hostile, local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 and n. 14 (1975), cert. denied 429 U.S. 1038 (noting that county regulation of state permitted forms of gambling were an example of such concerns).\3

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3. In Bryan v. Itasca County, the Court noted with approval the Ninth Circuit Court of Appeal's concern that state regulatory authority over reservation Indians could serve to channel economic development elsewhere, and further

(Continued on next page)

The amici tribes urge the Court to keep in mind the ramifications of the state's legal position for other tribes and the implications of that position in other state/tribal jurisdictional contexts.

SUMMARY OF ARGUMENT

The focus of this amicus brief is on the question of whether a federal common law balancing test or "Public Law 280" controls the determination of state jurisdiction. The thrust of California's argument is that this Court is free to decide, as a matter of policy, whether a state may legislate the parameters of permissible tribal activity on trust or

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(Footnote 3 continued)
undermine the ability of tribes to improve reservation living conditions. Bryan v. Itasca County, 426 U.S. 373, 388 n. 14 (1976).

restricted lands within the Tribe's reservation. California and its supporting amici attempt to extract sweeping new Indian law principles from this Court's decision in Rice v. Rehner, 463 U.S. 713 (1983). If this Court were to adopt their interpretation of "modern federal Indian law," it would be departing substantially from both its earlier and most recent Indian law decisions.

Rice clearly was not intended to invade the exclusive province of Congress to decide the extent to which states may apply their laws to reservation tribes and their members. In Rice, this Court upheld the imposition of state liquor licensing requirements upon a tribal member "[b]ecause we find that Congress has delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country..." 463 U.S. at 715. The

Court recognized that, although tribes may have lacked self-governing authority over liquor transactions and states may have had concurrent jurisdiction to prevent non-Indians from selling liquor to Indians, a Congressional delegation was necessary "to fill the void" in federal/state law applicable to tribal members once the federal prohibition upon their sales was lifted. Id. at 733.

This traditional immunity of reservation tribes and their members from the application of state laws is well established. It requires careful attention to the identity of the persons and entities against whom a state law is to be enforced. See, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 US 134, 151 (1980). The states have ignored such critical factors in arguing they have residuary jurisdiction over tribes and that this matter may be decided by a balancing test. This Court has ruled that

the application of state laws to tribes in situations such as this is impermissible in the absence of Congressional authorization. Moreover, Public Law 280, 67 Stat. 588, set the parameters for assertions of state jurisdiction over reservation Indians, in the absence of other federal statutes addressing the particular Indian activity involved. As this Court explained in McClanahan v. Arizona Tax Commission, the "modern cases" on state jurisdiction over reservation Indians lock to the applicable treaties and statutes, such as Public Law 280, "which define the limits of state power." 411 U.S. 164, 172 (1973). The Court noted that:

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. Organized Village of Kake v. Egan, 369 U.S. 60, 62, 7 L. Ed.2d 573, 82 S. Ct. 562 (1962); Federal Indian Law 846. The question is generally of little more

> than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

Id. at 172 n. 8.

A close examination of Bryan v. Itasca County, 426 U.S. 373 (1976), including the briefs and record in that case, make it clear that the the Court carefully considered its statements regarding Pub L 280's effect on state regulatory authority. Those statements constituted rulings on a critical issue, and were not dictum.

Amici tribes are concerned not only with the implications of the new Indian law principles urged by the states in regard to revenue raising from bingo and similar games. If adopted, the fundamental changes proposed in the scope of this Court's prior rulings can have broad ranging implications beyond the regulation of gambling. Particularly when Congress is aware of

state concerns regarding Indian gaming activities and is considering the need for any change in the current the law, this Court should be hesitant to intrude upon a province that it has traditionally left to legislative determination.

ARGUMENT

I.

WITHIN AN INDIAN RESERVATION, CONGRESSIONAL AUTHORIZATION IS NECESSARY FOR STATES TO REGULATE INDIAN TRIBES

A. In Determining the Applicable Legal Principles, It Is Critical To Identify At The Outset To Whom The State Law Is To Be Applied

The California and county laws at issue are laws governing operators of bingo and card games. The players are not violating any specific state or local law by their participation in the games. Although the appellee tribes may have utilized non-Indian owned management companies, they

explain in their brief why this does not alter the fact that the tribes are the operators of the games. In terms of whether a common law balancing test can determine the applicability of these laws in this case, the fact that the subject of state regulation is the Tribe is critical. It serves to distinquish those cases in which a balancing test has been used to find state law applicable in the absence of Congressional authorization.

This Court should begin its analysis as it did in McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). The state court decision being reviewed in that case was based on essentially the same theories of state jurisdiction as have been proposed here, i.e., states have concurrent jurisdiction on Indian reservations and therefore in the absence of a countervailing tribal self-government interest, state laws may be applied to tribal members. 411 U.S. at 167. Before

deciding whether state jurisdiction was preempted, the Court emphasized that it was "not concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations" and that it was dealing with on-reservation activity by an Indian whose tribe had the "usual accoutrements of tribal self-government." Id. at 167-168. The Court then went on to reaffirm that Navajo treaty provisions setting aside the reservation for Indian use and controlling white entry were sufficient in themselves "to preclude the extension of state law - including state tax law - to Indians on the Navajo Reservation." McClanahan v. Arizona Tax Commission, 411 U.S. at 175.\4 In

4. In regard to the argument that states have "residual" authority over reservation Indians based on principles discussed in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Court noted that that case dealt with non-reservation Indians and that different principles would apply regarding "the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians."
(Continued on next page)

examining subsequent legislation, the Court concluded that "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." Id. at 137.

The provisions in the organic documents providing for the Navajo Reservation and the subsequent legislation discussed in McClanahan are not unique to the Navajos. The Tulalip Tribe has a treaty with similar provisions regarding use and white entry. See, Treaty of Point Elliott, 12 Stat. 927, Washington v. Fishing Vessel Assn., 443 U.S. 658, 663 n. 3 (1979). Although without such treaties, the California tribes were to have a similar status on their reservations. See, e.g. Mission Indian Relief Act, 26 Stat. 712,

(Footnote 4 continued)
411 U.S. at 176 n. 15. See also, Note, The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 Hastings LJ 1451, 1459, 1477-1481 (1974).

Sec. 3 (1891) ("for sole use and benefit for band or village").

The subsequent legislation which this Court cited in McClanahan to conclude that Congress had continued its initial preemption of state jurisdiction over tribes was not limited to the area of taxation. Besides legislation on taxation of Indians, the Court noted special Congressional authorization to apply state liquor, health and education laws within Indian reservations. Like state gambling laws, the subject areas covered by other cited statutes are also ones in which states can claim significant interests and potential effects on non-tribal members.\5

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5. The earlier decisions on which McClanahan relied for preemption by treaty involved on reservation commercial transactions that were not restricted to sales between members. See, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 687, 690 (1965); Williams v. Lee, 358 U.S. 217, 221-222 (1959). Those factors did not alter the finding of preemption of state authority as to the tribe or its members.

As was true of the tax statutes, those other federal laws would be "explicable only if Congress assumed that the States lacked the power to impose [their laws] without special authorization." See, McClanahan v. Arizona Tax Commission, 411 U.S. at 177 and n. 16.\6

The result of the preemption analysis in McClanahan was to reaffirm that state laws are not applicable to reservation tribes and their members in the absence of Congressional authorization.

B. A Balancing Test Has Only Been Deemed Sufficient To Allow The Extension Of

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6. The principles applicable to the determination of state taxing authority are not unique to Indian tax disputes but rather are derived from general principles regarding the application of state laws to tribes. See, McClanahan v. Arizona Tax Commission, 411 U.S. at 170-171, quoting from U.S. Dept. of the Interior, Federal Indian Law 845 (1958); Bryan v. Itasca County, 426 U.S. 373, 376 n. 2 (1976).

State Laws To Indian Reservations When The Alleged Illegal Activity Was Committed By A Non-member.

In cases where a balancing test has supported state jurisdiction, the object of state law enforcement was alleged illegal activity by a non-member. See, e.g., Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. at 151 (state taxes whose incidence fell upon non-member purchasers could be applied); White Mountain Apache Tribe v. Bracker, 448 U.S. 148 (1980) (balancing test used to determine enforceability of motor carrier and use fuel tax against non-member log transporters); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982) (balancing test used to determine enforceability of state gross receipts tax against non-member builder); New Mexico v. Mescalero Tribe, 462 U.S. 324 (1983) (balancing used to determine applicability of state hunting and fishing regulations to

non-members).

However, while state interests have been balanced against tribal/federal interests where non-members are allegedly violating a state law requirement, the situation is different where the object of enforcement is a tribe or its members. For example, the application of state vendor licensing requirements to a tribal member was analyzed differently from taxes whose incidence was on a non-member purchaser. See, Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) (cigarette sales to non-Indians from off reservation). In spite of arguable state interests, the licensing requirement fell within the traditional immunity of tribes and their members from unauthorized state regulation of their on-reservaton activities, regardless of the commercial nature of the sales, the percentage of off-reservation non-member consumers, the health hazards of cigarettes, etc. In Rice v. Rehner, this

Court assumed that, in spite of the strong state interests and lack of interference with tribal self-government, there would have been a state/federal law enforcement "void" if Congress had not delegated states authority to regulate liquor selling by reservation members. 463 U.S. at 733. In the absence of federal legislation authorizing the application of state law to the tribal member, the state could not restrict the Indian seller.\7

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7. The Court in Rice found concurrent state jurisdiction to prohibit non-members from selling liquor to Indians or introducing it in Indian country. 463 U.S. at 723, n. 10, and Blackman, J. dissenting, 463 U.S. at 740, n. 2. But state regulation of members required Congressional authorization. Rice utilized an examination of respective governmental interests in deciding whether the Congressional delegation of state jurisdiction had to be explicit, as had been contended by Eva Rehner. The Court said:

> The thrust of Rehner's argument, and the primary focus of the Court below, is that state authority in this area is pre-empted because such authority requires an express statement by Congress in light of the canon of construction that we

(Continued on next page)

In both the Colville and Moe cases, the Court was concerned that the Indian's competitive advantage was "dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation."

(Footnote 7 continued)

> quoted in McClanahan, supra: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' "...As we have established above, because of the lack of a tradition of self-government in the area of liquor regulation, it is not neessary that Congress indicate expressly that the State has jurisdiction to regulate the licensing and distribution of alcohol.

Id. at 731 (emphasis added, citations omitted).

The Court employed a balancing test to determine the most likely Congressional intent in the absence of an explicit statement authorizing state jurisdiction. The Court concluded that the statutory language and intent in 18 U.S.C. 1161 was plain. Id. at 730. It did not rule that states may have jurisdiction over reservation Indians even in the absence of federal legislation authorizing such jurisdiction, so long as State interests outweigh federal and tribal interests.

Washington v. Confederated Tribes, 447 U.S. at 151, quoting from Moe v. Salish & Kootenai Tribes, 425 U.S. at 482. That simply is not the situation here. Non-Indian players are not flouting any state legal obligation. The question is not whether tribes are providing an opportunity for non-Indians to evade their legal obligations to the states. The question is whether Congress has authorized states to regulate and enforce their laws against tribes.

II.

PUBLIC LAW 280 PREEMPTS A STATE'S REGULATORY AUTHORITY OVER TRIBAL MEMBERS AND THE ASSERTION OF JURISDICTION OVER TRIBES

A. In The Absence Of Other Legislation Authorizing State Jurisdiction Over A Particular On Reservation Tribal Activity, The Limits Of Public Law 280 Jurisdiction Control.

Congress has spoken on the extent of

permissible state jurisdiction over reservation Indians and Tribes. By passing Pub L 280, Congress authorized certain criminal and civil jurisdiction over reservation Indians. In McClanahan, this Court also ruled that a state could not impose its laws on Indians other than in accordance with that act. 411 U.S. at 177-178. After finding that Congress had preempted state authority over reservation tribes and their members prior to Pub L 280, the Court went on to hold that Pub L 280 now controls any assertion of civil and criminal jurisdiction over reservation Indians.

In McClanahan, Arizona had failed to take the steps necessary to assert jurisdiction under Pub L 280. It conceded that therefore its courts "can exercise neither civil nor criminal jurisdiction over reservation Indians." 411 U.S. at 178. This Court noted that Arizona's

concession was inescapable in light of prior caselaw, and that "the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." Id. at 178 n. 19 and 179. The examples of prior caselaw cited by the Court, U.S. v. Kagama and Kennerly v. Dist. Ct., had made clear that state authority to impose its laws on reservation Indians was preempted and could only be asserted as specifically permitted by Congress. In U.S. v. Kagama, the Court had early defined the relationship between states and Indian tribes, holding that tribes were "thus far not brought under the laws of the Union or of the State within whose limits they resided." 118 U.S. 375, 382 (1886). Before discussing the effect of Pub L 280, the Court in McClanahan, quoted this statement from Kagama, ruling that while federal preemption was the modern test of state authority within reservations, the Kagama holding regarding state authority

over tribes is "nonetheless still true, as it was in the last century." 411 U.S. at 173. In Kennerly v. District Court, the Court had strictly enforced the parameters set by Pub L 280 for assertions of state jurisdiction over tribes, saying that the statute reflected "the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country." 400 U.S. 423, 424 n. 1 (1971).

Thus, this Court has invalidated state assertions of jurisdiction over tribes and their members when not in accordance with Pub L 280. And more recently, this Court again ruled that Pub L 280 controls the extent to which states may impose their laws against Indians, this time in the context of a state attempt at

retrocession.\8 Three Affiliated Tribes v. Wold Engineering, 476 U.S. ____, 90 L.

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8. The earlier ruling in Three Tribes I that Pub L 280 does not preempt the authority of a state court to entertain a suit by an Indian tribe is clearly distinquishable from situations in which states seek to impose their legislative authority upon an Indian tribe. Three Tribes I recognized that Indians have the right to sue, as do other persons. Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984). This principle had long been established before Pub L 280 was passed and has been repeatedly recognized. See, McClanahan v. Arizona Tax Commission, 411 U.S. at 172-173, citing, as an example, Felix v. Patrick, 145 U.S. 317, 332 (1892); Williams v. Lee, 358 U.S. 217, 219-220 (1959) ("suits by Indians against outsiders have been sanctioned). Invoking a court's jurisdiction over other persons to obtain redress for grievances presents a different question from being subjected to court jurisdiction as a defendant, or being subjected to state legislative authority. See, e.g. United States v. Fidelity Guaranty Co., 309 U.S. 506 (1940); Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 NDL Rev. 267, 275 (1973) (The Indian right to sue in state courts "certainly does not expand state power to legislate affecting Indians on reservations.") In Three Tribes II, the Court ruled that because of the preemptive effect of Pub L 280 and its 1968 amendments, a state could not refuse to entertain a suit by a tribe because the tribe refused to waive its immunity from state law enforcement.

Ed.2d 881, 890-891, 106 S. Ct. ____ (1986) ("Three Tribes II").

In Three Tribes II, the Court ruled:

> Pub. L. 280...was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation providing for all affected States to come within its terms.
>
> ....
>
> We have previously enforced the procedural requirements and the jurisdictional provisions of Pub. L. 280 quite stringently, consistent with our understanding that the jurisdictional scheme embodied in that Act was the product of a wide-ranging and detailed congressional study...Accordingly, we conclude that since North Dakota's disclaimer is not authorized by (1323(a), it is barred by that section.

Id. (citations omitted).

Numerous state court decisions have rejected arguments of state residual jurisdiction over reservation Indians because Pub L 280 now determines the extent to which states may impose their

laws against reservation Indians. See, Nenna v. Moreno, 132 Ariz. 565, 647 P.2d 1163, 1164, (Ariz. App. 1982), (child support); Malaterre v. Malaterre, 293 N.W. 2d 139, 143-144 (N.D. 1980) (divorce modification regarding child custody); Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085, 1087-1088 (1974) (state motor vehicles laws); Martin v. Juvenile Court, 177 Colo. 261, 493 P.2d 1093 (1972) (paternity suit); Blackwolf v. Dist. Ct., 158 Mont. 493, 523 P.2d 1293 (1972) (delinquency proceedings); Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971) (mortgage foreclosure); State ex rel. Adams v. Superior Ct., 57 Wn.2d 181, 183-184, 356 P.2d 985 (1960) (child dependency). A substantial number of cases have found Pub L 280 preemptive as to state assertions of authority over reservation Indians, while other cases have held that Pub L 280 does not preclude jurisdiction over non-Indians in

Indian country so long as Indians are not affected. F. Cohen, Handbook of Federal Indian Law, 367-368 (1982 ed.) (hereafter, Federal Indian Law).

In her oft cited article, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 543 (1975), Professor Goldberg repeatedly emphasized the preemptive effect of Pub L 280 on questions of state authority over reservation Indians. Id. at 540, 575 n. 183, 593 n. 260.

The preemption test for state jurisdiction on Indian reservations favors exclusive federal control, and looks to the "thrust" of a detailed federal regulatory scheme. Three Tribes II, 90 L. Ed.2d at 890. As held in Bryan v. Itasca County, supra, the thrust of Pub L 280 was to provide limited state jurisdiction for basic law and order problems and the litigation of civil disputes between

private parties, not to permit state regulatory authority over reservation Indians or state legislative control of tribal governments.

Pub L 280 defines the limits of permissible state jurisdiction whether or not a state has accepted the jurisdiction permitted by that statute. If Congress chose not to include jurisdiction over tribes or the application of state civil regulatory laws to Indians when it consented to broader state jurisdiction on reservations, no "anomaly" exists between so-called Pub L 280 states and non Pub L 280 states. State authority to impose its laws against tribes has always required Congressional consent, and in the absence of another federal law granting that jurisdiction, the scope of authority permissible under Pub L 280 controls all states. See, Kennerly v. District Court, 440 U.S. at 424-425 and n. 1 (under Pub L 280, "state assumption of civil

jurisdiction - in situations where Congress had not explicitly extended jurisdiction - was governed by (7). Without assuming Pub L 280 jurisdiction, a "non 280" state simply would not have any civil or criminal jurisdiction over tribes or their members, in the absence of another federal statute permitting such authority. McClanahan v. Arizona Tax Commission, 411 U.S. at 178.

B. The Bryan Distinction As To Regulatory Law Enforcement Under Public Law 280 Is Not Dictum.

This Court's decision in Bryan v. Itasca County, supra, that Pub L 280 did not authorize the application of regulatory laws to reservation Indians is not dictum.

As discussed below, the question of whether Pub L 280 extended state regulatory laws to reservation Indians was a critical issue in Bryan. Even if the lack of intent to authorize that type of

jurisdiction was not the sole basis for the Bryan decision, it was clearly one of the grounds. To call this Court's statements on this point "dictum" is contrary to the well settled interpretation of that term. See, Union P.R. Co. v. Mason City & F.T. D. R. Co., 199 U.S. 159, 165-166 (1905); Six Companies of Cal. v. Joint Highway Dist. No. 13, 311 U.S. 180, 187 (1940); Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

In Bryan, the Court found it necessary to determine what Congress intended by the phrase "civil laws...of general application to private persons or private property," contained in (4(a) of Pub. L. 280.\9 The tax at issue was characterized

9. In choosing from the possible meanings of this phrase, the Court undertook a comprehensive review of the statutory langauge, the applicable canons of construction, and the legislative history. Contrary to the suggestion that the Court in Bryan may not have had all the legislative history before it, the opinion separately cites S. Rep. No. 699, 83rd Cong., 1st Sess. (1953), and H. R. Rep.

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as a personal property tax, and therefore, not within the exceptions to state jurisdiction contained in (4(b). See, Bryan v. Itasca County, 426 U.S. at 379 n.

(Footnote 9 continued)
No. 848, 83rd Cong., 1st Sess. (1953), and indicates that it did not simply look to quoted sections in a law review article. Bryan v. Hasca County, 426 U.S. at 380 and n. 5. The Miller letter, relied on by Arizona, Nevada and New Mexico, in their amici brief, was also before the Court. See, Appendix, on Writ of Certiorari to the Supreme Court of Minnesota, in Bryan, supra, which included the June 26, 1953 Miller letter as item "M," Appendix 1, p. 69 (Lewis to Congressman A.L. Miller, Chairman, Committee on Interior and Insular Affairs, House of Representatives, relating to H.R. 1063 [Pub L 83-280], June 26, 1983). The cited language from the reports and the Miller letter is almost verbatim from the statute, and adds no real clarification to its meaning. Id., S. Rep. No. 699, 83rd Cong., 1st Sess. (1953); H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953). The addition of the word "substantive" in these documents to the statutory phrase "civil laws...of general application to private persons or private property" is not inconsistent with the Bryan interpretation. In interpreting the phrase to incorporate only state common law generally applicable to civil disputes between private parties, the Court did not limit the applicable state common law to procedural court rules.

4. Relying on the (4(a) phrase, "civil laws...of general application to private persons or private property," the Minnesota Supreme Court had concluded that "Public Law 280 is a clear grant of the power to tax." Id., at 378.

Construing the intended meaning of the (4(a) phrase from among the various interpretations proposed by the parties was no less critical to this Court's decision in Bryan then was the Court's interpretation of the phrase "in conformity both with the laws of the State...and with an ordinance duly adopted by the tribes," to the decision in Rice v. Rehner, supra.\10

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10. In Bryan, as in Rice, the Court did not assume that the principle requiring express Congressional consent to the extension of state laws necessarily meant that the absence of the words "state jurisdiction," in Rice and the absence of a reference to "tax" in (4(a) of Pub. L. 280 ended the matter. This approach was particularly appropriate in Bryan, where (4(b) did address the application of certain types of taxes and the state court had ruled (4(a) must have been intended to allow other forms of taxation. Moreover,

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The crux of the dispute over the meaning of the (4(a) phrase was whether it encompassed all civil laws, thereby granting plenary criminal and civil jurisdiction to states, or whether it only referred to court rules of decision applicable to disputes between private parties. In order to decide whether state tax laws would be included in the phrase, it was essential to decide which of these meanings was intended. The Court interpreted the phrase to be limited to court rules of decision, characterizing the

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(Footnote 10 continued)
in Rice, an alternative ground for decision was that the "in conformity" language was sufficiently plain to meet a requirement of express Congressional authorization. 463 U.S. at 730. If interpreting the meaning of "civil laws...of general application" in Bryan is dictum because the Court could simply have decided that tax laws must be specifically mentioned in any grant of state jurisdiction, then all of Rice's discussion of state interests and tribal sovereignty to establish that an express grant of state liquor jurisdiction was unnecessary, must also be treated as dictum.

excluded body of law enacted by state legislatures as "civil regulatory."

The state court opinion reviewed in Bryan, and the parties' briefs, make it clear that the proper characterization of laws applicable under the (4(a) phrase was the heart of the dispute. The Minnesota Supreme Court's opinion was grounded upon its conclusion that Pub L 280 had worked a radical change in the prior legal status of reservation Indians vis a vis the states, and that by granting states plenary civil and criminal jurisdiction, Congress necessarily granted taxing power not specifically excluded. Opinion of the Supreme Court of Minnesota, Appendix on Writ of Certiorari to the Supreme Court of Minnesota, p. 36.

The Minnesota Supreme Court started with the fundamental premise discussed in (I of this brief, which was well established at the time Pub. L. 280 was

passed. It quoted from a 1944 Minnesota Supreme Court decision:

> [B]ut, it is uniformly held that, absent a treaty or federal statute conferring it, a state's jurisdiction does not extend over the individual members of an Indian tribe maintaining their tribal relations and organization upon a reservation within the geographic limits of the state.

Opinion, p. 40 (quoting from State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (1944).

Summarizing "the current status of the law set forth in the McClanahan and Mescalero," the state supreme court in Bryan said:

> (2) Congress has plenary jurisdiction over reservation Indians. That jurisdiction may be ceded to the state's only by express grants of jurisdiction. In absence of such grants, no state power exists.

Opinion, p. 39.

The state court then went on to conclude that the legislative history, language, and structure of Pub L 280 supported finding an express grant. In doing so, it relied heavily upon Omaha Tribe of Indians v. Peters, 382 F. Supp. 421 (D. Neb. 1974), in which the federal district court for the District of Nebraska had ruled that in (4(a) Congress expressly subjected Indians to all state laws of general application and therefore tax laws were necessarily applicable, except as specifically excluded. Opinion, Bryan Appendix, pp. 44-45, 47.

In this Court, in Bryan, the parties argued the possible alternative interpretations of the (4(a) phrase. For example, the respondent County argued:

> ...There are only two jurisdictional sections, one for civil and one for criminal jurisdiction. If Congress had conceived a third class of laws encompassing state tax laws, land use regulations, water laws and

other general non criminal laws, and had considered that these laws were enforced by a judicial proceeding which is neither criminal nor civil, it is likely that it would have dealt with that class in a third section or have wholly excepted that class from the operation of both the civil and criminal sections. However, it took neither of these approaches. Instead it merely subjected the broad grants of jurisdiction to limited exceptions in favor of trust and restricted property.

Brief for the Respondent, pp. 8-9.

In its brief, the petitioner argued:

So Congress in Public Law 280 allowed Indians to go to state courts and provided them with a ready-made body of state law to look to in resolving their private civil disputes. Congress intended "civil laws...of general application" to mean those laws which have to do with private rights and status. Therefore, "civil laws...of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent and similar matters, but would not include laws declaring or implementing the states' sovereign powers, such as the unique power to raise revenue. The latter are not within the normal meaning of "private" laws.

A comparison of the Public Law 280

> language with that used in the termination acts again reveals the limited nature of Congress' grant in the former statute. Thus, while Congress made all state laws applicable to both tribes and their members in the termination acts, in Public Law 280 it authorized state jurisdiction only over those civil causes of action affecting private persons or private property on Indian reservations. Tribes were conspicuously left out of the conferral of jurisdiction in section (a) although included in sections (b) and (c). This is not surprising since it would have been wholly inappropriate to have tribes resolve their disputes in state courts. Indeed, in 1966, thirteen years after Public Law 280, Congress enacted 28 U.S.C. {1362 which provided special federal court jurisdiction for tribal controversies.

The issue in Bryan was whether Public Law 280 excluded a vast body of state laws which cannot easily be characterized as either civil or criminal and are generally referred to as regulatory. The Court in Bryan expressly adopted the Petitioner's interpretation of the disputed statutory language. 426 U.S. at 383-385, 389-390, and n. 10-11.

At the time Bryan was decided, this critical question regarding the scope of Pub L 280 authority had received substantial attention. The Court realized that the answer would not only be important to disputes over taxation, but also to disputes over other regulatory assertions of state jurisdiction. See, e.g., Santa Rosa Band of Mission Indians v. Kings County, supra (holding that Public Law 280 was not intended to extend state regulatory laws to reservation Indians and that local land use requirements are inapplicable); Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 N.D.L. Rev. 267 (1973); Note, The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 Hastings LJ 1451 (1974), all of which were cited in Bryan.

The Court in Bryan did not simply make

a single, offhand reference to the regulatory issue. It identified the lack of intent to grant such regulatory authority as a basic premise of its decision, at least four different times. Bryan v. Itasca County, 426 at 384, 387, 388 and n. 14. It explained the distinction it was drawing between state court common law and state legislation implementing the State's general police powers, adopting petitioner's interpretation and that proposed in a comprehensive law review article on the subject. Bryan v. Itasca County, 426 U.S. at 383-384, n. 10.

Since Bryan was decided, it has been consistently interpreted to preclude state regulatory jurisdiction under Pub. L. 280. See, Federal Indian Law, 363-365; Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479, 522 (1979). Federal administrative policies and programs have been fashioned around the

no regulatory jurisdiction principle. For example, EPA works directly with tribes even in "280 states" to implement federal environmental laws, rather than approving State implementation on Indian lands. EPA general counsel have consistently interpretated such State regulatory authority to be outside the scope of Pub L 280, in light of well-established Indian law principles, the statutory language and legislative history, and the Bryan decision. See, EPA General Counsel Opinion, No. 76-28A (December 8, 1976); EPA General Counsel Opinion, No. 76-30 (December 8, 1976); EPA General Counsel Opinion, No. 77-6 (May 31, 1977). See also, Will, Indian Lands Environment - Who Should Protect It?, 18 Nat. Res. J. 465, 487-491 (1978). EPA has established federal environmental law implementation programs for Indian reservations which take into account the unique jurisdictional

considerations there, and federal policies to promote tribal self-government and economic development. Its jurisdictional and policy rationale for refusing to approve state implementation programs as to Indian lands has been upheld in court challenges. Nance v. EPA, 645 F.2d 701 (9th Cir.), cert. denied sub. nomin; Crow Tribe of Indians v. EPA, 102 S. Ct. 635 (1981); State of Wash., Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985). Congress has followed the EPA approach by enacting statutory provisions expressly allowing EPA to treat tribal governments like states for purposes of implementing federal environmental laws on their reservations. See, e.g., Nance v. EPA, 645 F.2d at 714; (regarding 1977 Clean Air Act amendments); Safe Drinking Water Act Amendments of 1986, Pub L 99-339, Sec. 302.

In Washington State, the King County Health Department has established a special health law enforcement program for the

Muckleshoot Indian Reservation. This cooperative county/tribal program reflects the common understanding that the state lacks regulatory jurisdiction over the tribe and its members. In recently analyzing the program's different treatment of non-Indian fee land owners on the Reservation, the Washington Court of Appeals reaffirmed the principles applicable here: 1) Pub L 280 did not authorize state regulatory authority over the tribe or its members; and 2) Rice v. Rehner did not eliminate the requirement for Congressional authorization for jurisdiction over reservation Indians. Thomsen v. King County, 39 Wn. App. 505, 508-510, 694 P.2d 40 (1985).

In 1977, a year after Bryan was decided, the California Attorney General's Office appeared to have no dispute with the widely accepted interpretation of Bryan as precluding state regulatory

authority under Pub L 280. In that year, it received a request for an opinion on whether the state had jurisdiction over open burning by the Quechan Tribe on its reservation, in light of Bryan. The California Attorney General Opinion concluded the State did not have such jurisdiction. It explained in detail the principles reflected in Bryan, agreeing that "Congress has only sparingly consented to the assumption of State jurisdiction over the activities of reservation Indians," and concluding that "if such authority exists it must derive in the first instance from a congressional grant of authority. Further, the only possible source of such a grant is the Clean Air Act." California Attorney General Opinion No. 50 77/10 I.L., pp. 4,7. As to the Clean Air Act, the Opinion states:

> These considerations tend to show that in enacting Section 118, the Congress did not take Indian tribes

> into account at all. Certainly there is no evidence of the intent necessary to subject Indians and tribes to state and local standards and limitations.

Id. at 10.

The federal district courts who have applied the no regulatory jurisdiction rule have commonly found the types of laws at issue in this case to be regulatory, and therefore, inapplicable.

C. The Regulatory/Prohibitory Distinction Is A Concept This Court Recognized Long Before Bryan. Its Rejection Has Implications For Federal Reservations Other Than Indian Reservations.

The states' arguments in this case regarding the scope of Pub L 280 authority amounts to the same argument made and rejected in Bryan, i.e. Pub. L. 280 authorized plenary state jurisdiction over reservation Indians. In arguing against the civil regulatory/prohibitory law distinction, Arizona, Nevada, and Mexico

explain why plenary state jurisdiction is the logical outcome of the states' position.

> ...any collection of State laws which, in the aggregate, forms a regulatory scheme which is civil in its general nature must by definition also include penal or prohibitory enforcement components. Otherwise, the State's regulatory objectives and policies will be rendered completely illusory and unattainable.
>
> Thus, even assuming the propriety of the questionable hypothesis that, under Pub. L. 280 and related similar laws (e.g. 18 U.S.C. (13, the "Assimilative Crimes Act," applicable in non-Pub. L. 280 states) Congress intended to include only a State's exclusively "criminal/prohibitory" laws, the inclusion of the penal or prohibitory enforcement components of systems otherwise characterized as "civil/regulatory" seems clearly to be intended.

Brief of the States of Arizona, Nevada and New Mexico, As Amici Curiae In Support of the State of California, p. 12.

Long before Bryan, in a case involving one of these "related similar laws," the

Court pointed out the need to draw a distinction between common law type crimes and activities which state legislatures have closely regulated through licensing and similar restrictions enforceable by criminal penalties. Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 389 n. 8 (1944). In Johnson, the Court considered whether the Assimilative Crimes Act might permit enforcement of state liquor laws on a military reservation. Although Johnson did not decide the issue, what is important about the Johnson statement is the concept it represents. When dealing with a federally established reservation that has traditionally been subject to exclusive federal jurisdiction, the Court must not assume that legislation such as the Assimilative Crimes Act and Pub L 280 was intended to result in the wholesale application of state laws. As noted in Johnson, in the absence of clear language authorizing state regulatory authority and

evidence that Congress considered the matter, a Court should not assume that Congress intended to alter so drastically a reservation's unique federal status. Furthermore, Johnson pointed out that the applicability of a particular state statute under federal statutes such as the Assimilative Crimes Act is a federal question, upon which the interpretation of state courts is not binding. 321 U.S. at 383.

In Bryan, this Court found a total absence in Pub L 280's legislative history of Congressional discussion of state civil regulatory authority, or jurisdiction over tribes. 426 U.S. at 389. Subsequent legislative history indicated a Congressional assumption that Pub L 280 had not altered jurisdiction as to regulatory laws with criminal penalties, e.g. state environmental laws. See, Bryan v. Itasca County, 426 U.S. at 386-387. The same sort

of assertions made by the states today about the intent of Pub L 280 and the possibility of undesirable and unregulated reservation businesses, in the absence of state jurisdiction, were answered by Senator Ervin, who offered and principally sponsored the 1968 Pub. L. 280 amendments. Id. at 387. Particularly in the context of regulating tribal activity on an Indian reservation by direct state enforcement of state laws, this caution is appropriate. In deciding that Pub L 280 was not intended to alter tribal government immunity from state control and the immunity of reservation Indians from state civil regulatory authority, the Court said that a contrary conclusion would mean that Pub. L. 280 was a termination act. Id., at 389-390. Concerns such as this led this Court to reject similar state arguments for plenary jurisdiction over reservation Indians selling cigarettes to non-Indians based on the General Allotment Act's

provision regarding state criminal and civil jurisdiction. See, Moe v. Salish and Kootenai Tribes, 425 U.S. at 477-479.

CONCLUSION

No act of Congress has authorized the state jurisdiction asserted here. Federal common law has not recognized such authority, and Pub L 280 now defines the limits of state jurisdiction over reservation Indians and tribes.

Whether courts characterize the test for permissible state jurisdiction under Pub L 280 as a civil regulatory/prohibitory distinction, or a public policy test, the essential concept has been thoroughly litigated and decided in Bryan. Congress granted states criminal jurisdiction to deal with basic law and order problems on Indian reservations. In addition, state courts could apply their common law rules of decision to private disputes, such as

contract matters, torts, and the like. However, the body of state regulatory law that may or may not contain criminal penalties, was not made applicable.

The running of bingo and card room games for what are essentially charitable, governmental purposes simply does not fall within the type of law and order concerns that were the motivating force behind Public Law 280. Moreover, Public Law 280 did not extend any state jurisdiction over tribes. Until Congress decides otherwise, tribal games are not subject to state law enforcement. It is for Congress, not the Court, to decide whether the omission of the state laws at issue here from Pub L 280 jurisdiction requires re-examination and whether there should be a change in the law.

Allen H. Sanders
Attorneys for Tulalip Tribes of Washington, Soboba Band of Mission Indians, LaJolla Band of Mission Indians, and the Trinidad Rancheria

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, by and through the WASHINGTON STATE GAMBLING COMMISSION, Plaintiff, v. CLARENCE HATCH, et al., Defendants.	)	NO. C83-1518R ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on a motion by defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Having reviewed the memoranda and other materials submitted by counsel, together with the relevant record and files herein, the court finds and rules as follows:

In this action for declaratory relief,

the Washington State Gambling Commission (the Commission) seeks a determination that Washington law pertaining to the operation of bingo games and pulltab chances may be enforced against the on-reservation activities of the Tulalip Indian Tribe (the Tribe). Defendants, seventeen employees of the Tulalip Entertainment Center, have moved for summary judgment claiming that the suit is barred by tribal sovereign immunity and that Public Law 280\1 does not provide the Commission a cause of action.

Viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the non-moving party, this court has determined that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law. Barona Group of Capitan

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1. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (commonly known as "Public Law 280").

Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1187 (9th Cir. 1982), cert. denied, 103 S.Ct. 2091 (1983).

I. FACTS

The Tulalip Tribes of Washington is an independent Indian Nation recognized by federal executive order with its reservation in the County of Snohomish. On February 6, 1982,\2 the Tulalip Board of Directors, the Tribe's governing body, enacted a Tribal Ordinance authorizing, with certain restrictions, the playing of bingo, punchboard and pulltab games within the reservation. The stated purpose of the ordinance was to promote economic development on the reservation and to raise funds for tribal social services and other governmental programs. Only the Tribal

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2. The Tulalip Ordinance was amended by the Tribe's Board of Directors on June 4, 1983. Exhibit 2, Attached to Defendants' Motion for Summary Judgment.

government, acting through the Tulalip Bingo Commission, may operate the games and all profits must go to the Tribe. The ordinance was reviewed and approved by the Secretary of the Interior.

According to the Tribe, the Tulalip Entertainment Center cost approximately $2,000,000 to construct. Since the opening of its gaming operation in June 1983, the Tribe has attracted a large number of players to its reservation for an opportunity gamble for prizes. The parties do not dispute the proceeds from the bingo and pulltab games contribute a vital share of the revenues of the Tribe.

The Commission brought an action in state court seeking a determination as to whether Public Law 280 authorized it to apply state laws to the Tulalip Tribe's on-reservation gambling activities. The defendants are seventeen individuals who are, or were at one time, allegedly involved in the management or supervision

of the gaming operation at the Tulalip Entertainment Center. The Tribe itself was not named as a defendant. The defendants removed the case to this court pursuant to 28 U.S.C. (1441.

II. DISCUSSION

The Tribe's gaming operation is clearly in violation of Washington law in several respects. First, RCW 9.46.020(2) permits the operation of a bingo hall by a qualified organization no more than three days per week. The Tribe's Entertainment Center is in operation seven days a week. Also, the Tribe is not a qualified organization as that term is defined by statute. RCW 9.46.020(3). Second, RCW 9.46.110 limits the value at which pulltabs may be sold to 25 cents per chance. Pulltabs are sold at the Tulalip Entertainment Center for 25 cents, 50 cents and one dollar.

Defendants contend that they need not comply with the above statutory provisions because of the Tribe's sovereign immunity to enforcement of state laws, and because of the Tribe's right to self-government. Defendants also argue that Public Law 280 does not confer jurisdiction on the State of Washington to enforce its bingo and pulltab laws on the Tulalip Reservation because these laws are "civil/regulatory" in nature, and thus do not fall within the Act's grant of criminal jurisdiction. The court turns first to the issues raised by Public Law 280.

The traditional rule is that states lack jurisdiction over Indian reservation activity, absent the consent of Congress. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In 1953, Congress delegated to the states some of its power to regulate affairs on Indian reservations by passing

Public Law 280. Sections 2 and 4 of Public Law 280\3 granted certain states the right to exercise criminal jurisdiction and limited civil jurisdiction over the Indian tribes. Section 7 of the Act\4 granted other states, such as Washington, the right to assume criminal and civil jurisdiction by legislative enactment. Pursuant to section 7, Washington assumed jurisdiction over reservation Indians in RCW ch. 37.12. See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). By this enactment, and with the consent of the Tribe,

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3. Codified at 18 U.S.C. (1162 and 28 U.S.C. (1360 respectively.

4. 67 Stat. 590 (1953) (repealed by Pub L. 90-284, Title IV, (403, 82 Stat. 79 (1968). Although section 7 of Public Law 280 was repealed in 1968 by section 403(b) of Public Law 284, any cessions of jurisdiction made pursuant to the Act prior to its repeal were not affected. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 313 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

Washington assumed jurisdiction over the Tulalip Indians to the full extent allowed by law.\5

In Bryan v. Itasca County, 426 U.S. 373 (1976), the Supreme Court construed section 4 of Public Law 280 to mean that states have jurisdiction only over private civil litigation involving Indians in state court. Under Itasca County, Washington is without authority to impose its civil/regulatory laws on the Tulalip Indian Reservation. Washington does, however,

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5. It should be noted that as to acts committed by Indians on Indian land, Washington took jurisdiction only over eight specific subject areas--chiefly welfare, family law and motor vehicles--but not gambling. Consequently, apart from those enumerated areas, Washington courts do not have jurisdiction over crimes committed by Indians within their reservations, unless the affected tribe has requested the state to assume jurisdiction. United States v. Farris, 624 F.2d 890, 895 (9th Cir. 1980). The Tulalip Tribe elected, by ordinance, to subject itself and its reservations to the civil and criminal jurisdiction of the State of Washington. Such jurisdiction became effective in 1958 and has not been retroceded.

have full criminal jurisdiction over offenses committed by the Tulalips on their reservation.\6 Thus, whether Washington's laws apply to the Tribe's bingo and pulltab gaming operation depends on whether the laws are classified as civil/regulatory or criminal/prohibitory in nature.

The Ninth Circuit addressed this question in Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 103 S.Ct. 2091 (1983). In that case, the Barona Group of Indians filed suit in federal court requesting declaratory and injunctive relief from the enforcement against them of certain California county and state laws pertaining to the operation of bingo games on the reservation. There, as in Washington, the state statute exempted bingo operations conducted by

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6. See supra note 5 and accompanying text.

certain charitable and nonprofit organizations under certain conditions from a general prohibition of gambling. Compare Cal. Penal Code (326.5(a) with RCW 9.46.020(3) and 9.46.030. The Ninth Circuit determined that whether a statute should be classified as regulatory or prohibitory depended on whether the activity complained of was against the public policy of the state. Evaluating the statute, the court determined that the California legislature intended to regulate rather than prohibit bingo. The court based this determination on the fact that bingo is allowed in California as a form of recreation, that certain charitable and nonprofit organizations are allowed to benefit by raising revenue from bingo and that the state regulates bingo halls only to prevent the game of bingo from becoming a money-making venture. Id. at 1189.

In interpreting Public Law 280, the

Barona court also recognized several important rules of construction applicable to statutes affecting Indian affairs. First, ambiguities in statutes concerning dependent tribes are to be liberally construed and resolved in favor of the Indians. Second, a finding of state jurisdiction over reservations is, historically, strongly disfavored. Third, well-established federal policies encourage tribal self-government and promote tribal economic development.

This court now considers whether the Washington statute is prohibitory or regulatory in nature. RCW 9.46.030 makes an exception for bingo and pulltabs from a general constitutional prohibition on lotteries. See Wash. Const. amend. 56. The exception applies to a variety of charitable and nonprofit organizations, RCW 9.46.020(3), but only to the extent that the games are conducted within narrowly defined conditions and restrictions. These

conditions and restrictions are consistent with the public policy of Washington, enunciated in RCW 9.46.010, to permit limited forms of gambling for fund raising purposes or for social pastimes. At the same time it was the clear intent of the legislature to restrain persons from seeking profit from professional gambling acts in the state and to restrain persons from patronizing professional gambling activities. Id.

The essence of the Commission's argument is that since the bingo games and pulltab changes are not conducted in compliance with the provisions of RCW 9.46.020(2) and 9.46.110, the gaming operators, defendants here, are conducting an illegal gambling enterprise and therefore subject to criminal prosecution under RCW 9.46.220. Thus, the Commission argues, the defendants' refusal to comply with the above statutory provisions

dictates a prohibitory classification for Washington's bingo and pulltab laws. This same argument was made and rejected in Barona and in two other cases with facts almost identical to the instant case. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), aff'g, 491 F. Supp. 1015 (S.D. Fla. 1980); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981). See Barona, 694 F.2d at 1189-90.

In Seminole, the Fifth Circuit concluded that Florida's bingo laws could not be applied to regulate bingo on the Seminole Reservation located within the state of Florida. Like Washington's laws governing the conduct of bingo, the Florida statute limits the conduct of bingo to certain defined organizations and regulates the conduct and frequency of games. Also, as in Washington,the Florida statute had removed the operation of bingo games from the general constitutional prohibition on

lotteries, but continued to denounce the evils of professional gambling. Seminole, 658 F.2d at 314, 316.

In addition, violators of the Florida bingo statute were subject to criminal prosecution. The court recognized, however, that while the inclusion of penal sanctions made it tempting to classify the statute as prohibitory, the Florida statute could not automatically be classified as such. "A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one." Seminole, 658 F.2d at 314. Instead, an analysis of the state's public policy was required in order to determine whether the statute was regulatory or prohibitory.\7 After reviewing the

7. In holding that the bingo statute was regulatory, the court in Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), relied on the "public policy" test developed in two Ninth Circuit cases, United States v. Marcyes, 557 F.2d

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statute, the court concluded that bingo fell in the category of gambling that the legislature has chosen to regulate by imposing certain limitations to avoid abuses. Id. Accordingly, the Seminole Indian Tribe was not subject to the

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(Footnote 7 continued)
1361 (9th Cir. 1977), and United States v. Farris, 624 F.2d 890 (9th Cir. 1980). In Marcyes, the court held that the Washington fireworks law was prohibitory and not regulatory. Evaluating the statute, the court found that the "purpose of the fireworks laws [was] not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens." 557 F.2d at 1365. Marcyes was distinguished in Seminole on the basis that the Marcyes court had found the possession of dangerous fireworks generally prohibited and not merely licensed. Seminole, 658 F.2d at 315.

Farris dealt with a Las Vegas-type casino operation on the Puyallup Reservation. The court found that the "violation of the law of state" requirement of section 1955 of the Organized Crime Control Act, 18 U.S.C. (1955, was intended to include in the federal prohibition those gambling operations contrary to state public policy as was the Puyallup gambling. 624 F.2d at 895-96. Based on this analysis, the Seminole court concluded that the state's public policy determines whether the activity is prohibited or regulated. 658 F.2d at 316.

regulations and could not be prosecuted for violating the limitations imposed. See also Oneida, 518 F. Supp. at 719 (general populace allowed to play bingo at will).

Applying the test set forth in Barona, 694 F.2d at 1189-90, this court concludes that Washington's bingo and pulltab laws are regulatory and of a civil nature. First, RCW 9.46.030 authorizes bingo and pulltab operations by a wide variety of charitable and nonprofit organizations. See RCW 9.46.020(3). There is no general prohibition against playing bingo or pulltabs. Compare United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). The Washington statute regulates bingo as a money making venture by limiting the location and number of days of operation, requiring that all proceeds be applied to the organization conducting the game and prohibiting the use of professional managers other than members or employees of

the organization. RCW 9.46.020(2). Pulltabs are regulated by limiting the price at which they may be sold. RCW 9.46.110. As in Barona and Seminole, the fact that so many diverse organizations are allowed to conduct gaming operations, even though under strict regulation, is contrary to a finding that such operations violate Washington public policy. 694 F.2d at 1189; 658 F.2d at 314.

Second, as in the other cases, the general populace of the State of Washington is allowed to play bingo and pulltabs.

Third, the Barona court in interpreting Public Law 180 stated that ambiguities in statutes concerning dependent tribes are to be resolved in favor of Indian sovereignty. 694 F.2d at 1190.

Finally, the stated purpose of the Tulalip gambling ordinance is to raise funds for the promotion of charitable and

nonprofit organizations and tribal governmental and social programs. The affidavits of defendants Hatch and Williams establish that the profits received by the Tribe from the bingo and pulltab activities are to be invested for the betterment of the Indian community. See Affidavits of Clarence Hatch and Wayne Williams. As was emphasized in Barona, "this intent to better the Indian community is as worthy as the other charitable purposes to which Bingo [and pulltab] proceeds are lawfully authorized under the [Washington] statute. 694 F.2d at 1190. Thus, while the Tulalip Tribe may not qualify as a charitable organization within the letter of the Washington gambling statute and the Tribe's gaming operation does not fully comply with all requirements of the statutory scheme, the Tulalip Tribe can be said to fall within the spirit of the statute's permissive intent.

In a supplemental memorandum, the

Commission also urged that this court permit the application of the state's bingo and pulltab regulations to the Tulalip gaming operation on the ground that state public policy prohibits the concentration of profits from bingo games in the hands of only a few operators. Even if it is true that the on-reservation activities of the Tribe have an impact on competing games operated by non-Indians off the reservation, this is not sufficient to convert the state's regulation into one which should be classified as prohibitory. Public Law 280 does not authorize the states to regulate tribal affairs merely because of a desire to equalize the distribution of funds among competing charitable and nonprofit organizations.

The court finds the Commission's other argument to be without merit. For all of the foregoing reasons, defendants' motion for summary judgment is GRANTED. This

action is hereby DISMISSED.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 13th day of August, 1984.

/s/

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE